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ABSTRACT

This paper reviews legal risks associated with staff layoffs at institutions of higher education and methods for managing those risks and describes planning steps designed to minimize institutional legal exposure. Legal risks include claims of breach of contract, discrimination, tortious conduct, and violation of labor laws, collective bargaining agreements, and other legal obligations. Well-managed institutions exhibit three common characteristics in planning and implementing staff layoffs: (1) a team approach to decision-making; (2) development of well-crafted and consistently administered personnel policies before initiation of the layoff process; and (3) attentiveness to existing and potential problem cases. Prior to implementing staff layoffs, institutions should: first, ascertain the reasons for and magnitude of the downsizing; second, prepare to counteract the argument that downsizing can be avoided by increasing revenues or cutting expenditures elsewhere; and third, prepare to show that the institution has considered alternative reductions in nonpersonnel expenditures, e.g., furloughs; reduced work time; hiring freezes and elimination of positions through attrition; and negotiated retirements. Preparation for the least disruptive layoff process requires advance communication with affected employees, consideration of quantitative and qualitative layoff criteria, a pre-implementation review, and establishment of an acceptable appeals process. Provision of severance benefits to affected employees and attention to the residual effects on remaining employees are components of a prudent risk management strategy. (CK)

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STAFF LAYOFFS AND TERMINATIONS -- MANAGING THE RISKS

Is Your Institution Prepared?

These are tough economic times for higher education, and many institutions are reacting by reorganizing departments and redeploying personnel. Many, perhaps most, colleges and universities face difficult decisions concerning staffing. This paper reviews legal risks associated with staff layoffs and methods for managing those risks. The paper emphasizes and describes preparation and planning steps designed to minimize legal exposure.

This paper was written by Martin Michaelson of the Washington, D.C. law firm Hogan & Hartson, and Lawrence White, University Counsel at Georgetown University.

"In real estate it's location, location, and location. In staff reductions it's planning, planning, and planning. This is not an area where you can fly by the seat of your pants. You are, after all, affecting people's lives in rather profound ways. You want to be sure they know you were as thoughtful as you could be in the way you went about it."

John J. Diehl, Esq.
University Counsel and Senior Advisor to the President
University of Rochester

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EXECUTIVE SUMMARY

Staff layoffs at colleges and universities, both campus-wide and department-specific, usually involve employees entitled to a broad array of substantive and procedural rights, may be contested in the public eye, and will likely provoke anxiety, anger, and other strong emotions in the workforce. Layoffs can entail such legal risks as claims of breach of contract, discrimination, tortious conduct, and violation of labor laws, collective bargaining agreements, and other legal obligations. Institutions should manage the risks through intelligent preparation and planning, well-designed procedures, and careful adherence to legally defensible operating standards.

Well-managed institutions exhibit three common characteristics in planning and implementing staff layoffs:

- A team approach to decision-making. The team, which includes lawyers, risk managers, human resource professionals, and public affairs specialists, is sensitive both to legal requirements and to the institution's long-term interest in stable, fair-minded employee relations.

- Development of well-crafted personnel policies that are in place before the layoff process begins. The policies are administered thoughtfully and consistently.

- Attentiveness to existing and potential problem cases. Managers address problem cases early and energetically.

For a "Pre-Termination Checklist" developed to help reduce potential institutional liability related to staff layoffs, see page 14.

"Whether an institution is reorganizing a small department or eliminating a large number of positions, staff reductions present one of the most critical legal issues for colleges and universities today."

Mike E. O'Neal
Vice Chancellor
Pepperdine University

I. THE CONTEXT IN WHICH LAYOFFS HAPPEN

Higher education is in recession. Faced with stagnant or declining enrollments, cuts in funding from government and other external sources, hostility to increases in tuition and fees, and steadily inflating fixed costs, colleges and universities must control or reduce discretionary costs to keep their budgets in balance. Because staff salaries and fringe benefits are the largest line item in most institutions' budgets, cost-containment efforts almost inevitably entail pressure to reduce the staff payroll. The institution is rare that has been spared traumatic layoffs, elimination of positions, personnel freezes, and other cost-containment measures that threaten staff members' job security. Also, many institutions have terminated personnel in departmental reorganizations undertaken to enhance productivity or respond to changed needs, rather than to cut costs. (In this paper we refer to all such reductions in force as "layoffs," but of course there are distinctions among them.)

Layoffs involve legal risks, many of which are addressed below. This paper is not, however, a substitute for consulting the institution's legal counsel on management of those risks. We recommend such consultation.

In the 1990s, few questions have so preoccupied college and university lawyers and risk assessment professionals as how best to manage layoffs. Employment-related administrative proceedings and lawsuits make up well over half of Educator's Legal Liability claims asserted against most colleges and universities. Claims related to layoffs and other termination actions are proliferating. While there is no known way to prevent all such claims, many institutions have learned that effective planning by their managers and counsel, both before and after layoffs are implemented, can keep exposure within anticipated and manageable limits. This paper is an overview for managers of some of the main strategies institutions use to contain legal risks incident to staff layoffs through intelligent preparation, well-designed implementation, and adherence to legally defensible standards and procedures. (Issues germane to layoffs of faculty members, such as how to ensure that faculty contract rights and tenure requirements are taken into account, are not treated in this paper.)

Our suggestions rest on the frequently asserted belief that the behavior of colleges and universities in conducting staff layoffs should be subject to more demanding expectations than that of most other employers. The prevalence of that view is not difficult to understand. Often a college or university is the largest employer in its community. It enjoys a deserved reputation for offering its personnel long-term job security and treating them humanely. As charitable organizations, colleges and universities are thought by many to be subject to a higher standard of probity, fairness, thoughtfulness, and accountability than profit-making enterprises usually are. Whether or not we agree with that view, it is clear that layoffs generate passion, are contentious, and likely will be seen as a breach of faith and an abandonment of values served by the institution for generations. It is therefore no surprise that plaintiffs' lawyers, journalists, community leaders, politicians, and judges often demand more of colleges and universities than of other corporate employers. Those who make layoff decisions should be mindful that their actions

> *"These are tenuous times for every college and university. Our marketplace is more competitive. Technology is changing the nature of the workplace. Most of us will be reducing or transforming staff in some way, through campus-wide downsizing, by restructuring specific departments, or by outsourcing a variety of services."*
>
> Carol Campbell
> Vice President and Treasurer
> Carleton College

will be closely and skeptically scrutinized when challenged in a grievance proceeding or courtroom. Their motives will be attacked, their reasoning criticized and mischaracterized, and their conduct judged under unusually restrictive procedural standards -- often, standards designed by staff members and highly protective of staff members' rights.

These, then, are common attributes of staff layoffs at colleges and universities: They involve employees entitled to an unusually broad array of substantive and procedural rights; they may be contested in the glare of media scrutiny and public attention; and they will provoke anxiety, anger, and other strong emotions in the workforce because employees accustomed to job security will feel betrayed. Well-managed institutions, sensitive to these factors, exhibit three common characteristics in planning and implementing staff layoffs:

First, the well-managed institution relies on a team approach to decision-making. The manager who makes the decision knows whom to consult, and *does* consult early enough in the process to make consultation useful. Lawyers and risk managers are key members of the planning team. Human resource professionals and public affairs specialists are on the team, too. There is no adequate substitute for managers of integrity who are guided not only by what the law compels, but also by the institution's long-term interest in stable, fair-minded labor relations.

Second, the institution has in place well-crafted personnel policies that it administers thoughtfully and consistently. Management is not confused about what processes to follow, what standards to apply, or what grievance rights to accord those who lose their jobs. Decisions are made fairly and with the expectation that the reasons will make sense if publicly aired. Effective managers make sure that they can affirmatively answer this question: If the layoff plan and the reasons for it are more or less accurately described on the front page of the leading local newspaper, will the institution be comfortable with its actions? We call this "the front page test." Passing that test is not always sufficient to minimize risk optimally, but it is necessary and conducive to that goal.

Third, institutional policies encourage managers to address existing and potential problem cases early and with high energy, whether the problem is performance-related or has another source. Problem cases worsen as time passes. Positions become entrenched and the parties more invested in "winning" than resolving disputes in a manner that makes financial and psychological sense. The experienced professional anticipates and addresses problem cases in an effort to prevent them from ripening into time- and energy-consuming distractions.

A layoff plan is unlikely to be an effective strategy if its purpose is to fix a pattern of deficient or untimely management of weak performance by employees. Generally, layoffs are more sound and defensible if based on programmatic or functional change or economic retrenchment.

II. LEGAL RISKS ASSOCIATED WITH STAFF LAYOFFS

To what legal risks does an institution expose itself when it lays off staff? How can the risks be anticipated and minimized?

A generation ago, under the traditional common law "employment at will" doctrine, the law in most states gave employers considerable latitude to terminate staff members for virtually any reason or none at all. With rare exceptions, neither federal nor state law was applied to thwart the day-to-day termination of employees or to block mass layoffs. In recent years, however, Congress, state legislatures, and federal and state courts have progressively restricted employment at will and accorded employees ever-expanding protections. Today, employees invoke an arsenal of legal theories to challenge layoffs and other terminations. Among these theories are breach of contract, unlawful discrimination, tortious conduct, and violation of labor laws and collective bargaining agreements.

Breach of Contract

Employment rights of university staff are defined in many documents, including appointment letters, employee handbooks, personnel manuals, and written policies, and even by customary practices. All of these can be deemed part of the employment "contract." Of course, collective bargaining agreements are also employment contracts. Courts often hold institutions liable for denying rights to which employees are entitled as a matter of employment contract law.

Thoughtful human resource management involves ongoing attention to the documentary and other underpinnings for potential breach of contract claims by employees. Many institutions collect human resource policies in an indexed personnel manual. The entire manual should be reviewed every year or two by human resource professionals and university counsel to ensure that policies are meticulous, current, and reflect changes in law and institutional practice since the last codification. The manual should clearly indicate that deficient performance is a ground for termination. Also, as discussed below, it is ordinarily wise to include in the manual a policy on layoffs. Under the policy, the institution should specifically reserve the right to terminate staff positions for financial or programmatic reasons, and should set out standards and procedures for effecting large-scale and department-specific layoffs that become necessary.

In addition to making claims under the institution's written policies, employees who face layoff sometimes assert that they are entitled to rely on oral promises of job security that they attribute to their supervisors. One commentator recommends that the institution's personnel manual explicitly disclaim oral employment guarantees, and suggests that the manual state this:

> "No person at the University now has or in the past has had the authority to make any binding oral promises, assurances, or representations regarding employment status or security. Therefore, no employee can legitimately rely on any such representation in the future, or continue to rely upon any such representation made in the past. Any such representations made prior to the effective date of this policy are hereby rescinded and superseded by this policy." (T.P. Hustoles, *Practical Considerations for Effecting Legally Defensible Reductions in Force*, a paper presented at the 32nd Annual Conference of the National Ass'n of College and University Attorneys, Chicago, Illinois, June 30, 1992, pp. 7-8.)

Whether such a disclaimer can be legally effective will likely depend on the factual context.

Several steps can help minimize exposure to claims for breach of employment contract. Personnel policies should be disseminated to all covered employees. Managers should be regularly trained on how to apply pertinent personnel policies; managers need to know what policies apply and where to turn for interpretive help. At institutions that require managers to evaluate subordinates in writing, managers should take the obligation seriously and see to it that evaluations adequately document any performance deficiencies that may bear on termination decisions down the road.

Discrimination Claims

It is unlawful to take an employment action against an employee if the action is motivated by consideration of the employee's race, national origin, religion, gender, age, disability, or membership in another statutorily-protected class. Although many states have extensive anti-discrimination laws, discrimination suits are usually grounded in federal law. For example:

- Claims of race, gender, national-origin or religion-related employment discrimination under Title VII of the 1964 Civil Rights Act or 42 U.S.C. § 1983.

- Discrimination on the basis of a disability under the Americans with Disabilities Act or the Rehabilitation Act of 1973.
- Age-related discrimination under the Age Discrimination in Employment Act.

Discrimination claims asserted under state or local law often involve equal protection provisions in the state constitution or claims under a state human rights statute or local ordinance.

Discrimination is claimed in many contexts. For example, layoff plans that incorporate early-retirement or specially negotiated severance arrangements often raise age discrimination issues under the Age Discrimination in Employment Act and the Older Workers Benefit Protection Act. The ADEA prohibits "involuntary retirement" of persons aged 40 and over on the basis of their age. Considerable litigation has involved whether early retirement plans offered as an alternative to layoffs are "voluntary." Two of the significant features of OWBPA pertinent to institutions that offer early retirement plans warrant special note. OWBPA sets standards for determining whether fringe-benefit-related early retirement inducements are provided equitably to older workers. It also restricts the institution's ability to require the employee to release ADEA claims in exchange for early retirement benefits. We briefly address both requirements in Section III. The institution's legal counsel should be consulted, as in other aspects of layoffs.

Many university counsel believe that discrimination claims are the most threatening claims connected to large-scale layoffs because of the exposure these claims entail to large judgments and attorneys' fees liability. The employer's liability can include back pay, compensatory damages, punitive damages, attorneys' fees, and equitable relief such as reinstatement.

We believe the risk of legal challenge on discrimination grounds to be so great, and the high cost of discrimination litigation so daunting, that special steps along the lines described in this paper should be taken during the pre-announcement phase of a large-scale layoff to ensure that the layoff plan can withstand attack on these grounds.

Tort Claims

In recent years, employment-related common-law tort theories have expanded. In addition to venerable causes of action such as wrongful discharge and fraudulent discharge, employees in many states now regularly sue for tortious interference with contractual relations, intentional infliction of emotional distress, defamation, breach of the implied covenant of fair dealing (a contract theory, strictly speaking, but one with the hallmarks of traditional tort litigation), and often other theories as well. Employers can be liable for compensatory and punitive damages, but are not usually exposed to attorneys' fees liability in such cases.

Claims Resting on Federal or State Labor Laws or a Collective Bargaining Agreement

The Worker Adjustment and Retraining Notification Act ("WARN") requires covered employers to give at least 60 days' written notice of "mass layoffs" and "plant closures" to affected employees or their collective bargaining representative, and to state and local monitoring agencies. Federal law also prohibits employers from terminating or laying off employees because courts have garnished their wages to pay off debts. Collective bargaining agreements and state public-sector labor laws often limit employers' rights to determine layoff sequences. In recent years, with job security foremost in union negotiators' minds, many collective bargaining agreements have incorporated elaborate restrictions to prevent employers from contracting out services performed by bargaining unit members. Such provisions often reduce, sometimes substantially, savings that can be achieved by layoffs, notably in maintenance and technical areas.

Other Claims

Layoffs at colleges and universities have often involved blue collar workers who provide maintenance or public safety services. When these employees are laid off, the institution's exposure to compliance violations may increase. For example, if public safety officers are laid off, the institution may court negligence liability for resultant increases in dangerous activity on campus.

Institutions may also experience a survivors' syndrome following layoffs. Not only do grievances, administrative complaints, and lawsuits from laid-off personnel increase, but employees not laid off tend to assert their rights more aggressively. Perhaps they do so because their morale is affected by added duties assigned when the workforce shrinks or because, fearful of the next wave of layoffs, they want their personnel records to be pristine and resist even the smallest blemish on their records.

Layoffs can provoke other kinds of claims as well. For example, in entering severance and separation agreements, care should be taken to comply with the "employment benefit plan" requirements of ERISA, if applicable. *See Goulet v. EASCO Hand Tools* (D. Mass. July 20, 1995).

> ***"At many institutions, layoffs will be carried out on some basis other than strict seniority, and planning may be quite decentralized and department-specific. A detailed review of each work unit's layoff plan by a legal/human resources team before the plan is implemented is essential."***
>
> Dorothy K. Robinson
> Vice President and General Counsel
> Yale University

III. CONSIDERING ALTERNATIVES TO LAYOFFS

A thoughtful higher education executive has recommended that institutions take three steps before the first public mention of possible staff layoffs:

- Determine with certainty the reasons for and magnitude of the downsizing. Revise the determinations only for the most pressing reasons.
- Prepare for the argument that downsizing can be avoided by increasing revenues or cutting expenditures elsewhere. Make the case forcefully for one, specific downsizing strategy. Revise the strategy only for the most pressing reasons.
- Prepare to show that the institution has considered alternative reductions in non-personnel expenditures, taking into account the institution's mission and ability to operate successfully after the downsizing.

(C.L. Harris, Jr., *Handling Employees in Downsizing*, NACUA Midwinter Continuing Legal Education Conference, March, 1992.)

Skepticism by employees, students, faculty, and the public is likely to be allayed to some extent if the institution can show that layoffs were undertaken only after alternatives were implemented or considered and rejected. We list below some alternatives that colleges and universities commonly pursue when financial shortfalls put pressure on the payroll.

Furloughs. Cash savings associated with temporary furloughs can sometimes make elimination of permanent positions unnecessary. Many thoughtful institutions include furlough authorization provisions in their personnel policies and collective bargaining agreements.[1] Absent such authorization, furloughs can cause legal problems. *See, e.g., Karr v. Michigan State University Board of Trustees*, 325 N.W.2d 605 (Mich. Ct. App. 1982), holding that a public university could not unilaterally furlough a tenure-track faculty member whose one-year

appointment letter specified the salary to which he was entitled.

Reducing work time. Sometimes it is possible to adjust downward the employee's weekly, monthly, or annual work time to reduce payroll (for example, by converting 12-month positions to nine- or ten-month positions).

Hiring freezes and elimination of positions through attrition. Critics are likely to contend that the institution should not be permitted to lay off employees if the salary line can be sufficiently reduced by not replacing employees who leave.

Negotiated retirements. Voluntary severance and early retirement plans, increasingly common throughout the country, have been implemented at many colleges and universities. Under a typical incentive plan, the institution offers a package of benefits to all or selected employees for a specified period. Employees who elect to retire are not replaced. Negotiated retirement plans and voluntary separation plans reduce the number of positions that must be eliminated by layoff, and may even reduce the payroll sufficiently through attrition to make layoffs unnecessary.

Negotiated retirement arrangements can be closely tailored to the institution's needs. The package of retirement-inducing benefits can be offered across the board. Alternatively, if doing so does not raise such other legal hazards as undue risk of discrimination claims or ERISA violation, benefits can be made available only to employees in particular departments or those who have reached a specified seniority level. Potential problems arise under the Age Discrimination in Employment Act, however, when eligibility criteria are related to age or such arguable age-surrogates as years of institutional service."

The Older Workers Benefit Protection Act was enacted in 1990 to protect older employees against coercive early-retirement plans. It generally prohibits employers from offering older workers severance terms materially less generous than terms offered the workforce as a whole under an early retirement incentive program. OWBRA also limits the employer's ability to obtain from older workers releases of age discrimination claims in exchange for sweetened early retirement benefits. Releases must adhere to exacting statutory requirements, such as these:

- The release must be in writing and expressed clearly.
- The employee must be advised in writing to consult an attorney before executing the release.
- The employee must be given at least 21 days to consider the release.
- The employee may unilaterally revoke the release for at least seven days after signing it.

OWBRA compliance, like other areas identified in this paper, can involve subtle legal judgments. Institutional counsel should be consulted.

IV. PREPARING FOR LAYOFFS

Communications: Essential Principles

Advance communication with affected employees and other pertinent institutional constituencies is usually desirable if the layoff is to be conducted in the least disruptive way. The rationale for staff layoffs should be developed, justified, and explained honestly and convinc-

> *"Limited resources are making staff reductions a necessity for many, if not most, institutions. The process of reducing positions will work best if all employees at the institution -- faculty and all levels of staff -- understand the need to restructure the workforce and are informed of that need early in the process."*
>
> Peter "Gus" Geil
> Vice President for Business and Finance
> Wittenberg University

ingly, and the institution should show that it will emerge from the process stronger and more able to perform its mission.

Layoff decisions often stem from progressive deterioration of the institution's financial position -- for example, a shortfall in tuition revenue, unanticipated increase in employee fringe benefit costs, sudden downturn in federal grant and contract support, or surge in utility expense. Months or even years may elapse from the moment of initial revelation to the final decision to implement a layoff plan that covers large units of the institution. The process often begins in the financial vice president's office, proceeds to the president, and quickly widens through concentric circles of the institution's management and constituencies. The earlier and more coherently the institution can inform its staff of the impending bad news, the better prepared and less bewildered staff members are likely to be.

As soon as large-scale layoffs are seriously contemplated, a small team of decision-makers should be assembled. The institution's lawyer, risk manager, human resource and benefits specialists, and a representative of the financial office should be key members. This small group should develop a coordinated and consistent communications strategy. Documents that explain the rationale for layoffs -- for example, reports to trustees, minutes of presidential cabinet meetings, charts designed to demonstrate the justification for layoffs, and public statements -- should be reviewed carefully before they are finalized and issued. Such documents may loom large in litigation contesting the layoffs.

Once the official message regarding the layoff has been finalized, it should ordinarily be promptly communicated to the institution's various constituencies. Usually, the message should focus on why layoffs are necessary. Most people react more sympathetically and with greater understanding if they learn of the institution's financial difficulties directly from its spokesperson rather than through the rumor mill.

Briefing sessions should be conducted for trustees and, at least in the case of public institutions, key legislators and government officials. "Town meetings" are often a useful setting in which to help explain to employees the financial conditions that have created the need for a layoff. Special communications with alumni, faculty, and students can take various forms, such as a president's letter and articles in the alumni magazine and student newspaper.

Community media merit close attention in the context of large-scale layoffs. In some big cities, even the mass layoff of staff members may not attract the media, but the level of interest is hard to predict. In small towns, where large institutions often have a dominant role in local politics and culture, the layoff of even a few employees can have community-wide reverberations that will be front-page news. At the very least, press releases should be prepared and distributed to the local media. In smaller communities, it may be particularly advisable to schedule a press conference to announce the layoffs.

To what extent, if any, should the institution's president figure in public communications about a large-scale layoff? Whether the president should be a visible spokesperson may depend on the layoff locus. If the layoff is confined to one or a few operating areas (for example, the teaching hospital, buildings and grounds, or central administration offices under the supervision of one vice president), wise strategy may call for delegation of communications responsibility far down the chain of command. It may be prudent to reserve the president for possible major public controversy. Naturally, the president's aptitude for effectively handling such situations should be taken into account.

Whether the contemplated layoffs involve personnel from many offices and departments or only a few or even one, sensitivity to each affected work unit's culture, specific personnel-management issues, and needs is imperative. Often, the planning of layoffs is necessarily decentralized, with some central administration

oversight and, hopefully, prior review. Consultation with the institution's counsel and human resource professionals is no less important where one or a few work units are involved than where institution-wide layoffs are.

Identifying Positions to be Eliminated

The overriding importance of the staff layoff policy. At many institutions, the personnel policies manual includes a layoff policy. At some forward-looking colleges and universities, the policy was crafted years before layoffs were imminent. Even at those institutions, however, the policy is often abbreviated and archaic, reflecting a bygone area when layoffs were rarely contemplated. An urgent planning group task is to determine as soon as the possibility of layoffs surfaces whether the institution's existing policy contains three critical elements:

- Criteria for determining layoff sequence and selecting individual employees for layoff.
- Timely opportunity for university counsel and other responsible offices, including the risk management, personnel, and affirmative action offices, to review layoff plans before implementation.
- An equitable but highly efficient process for limited appeal by affected staff members.

If the institution's layoff policy fails to address these elements, the institution is likely to face a Hobson's choice between, on the one hand, amending the policy shortly before a round of layoffs, thereby increasing breach-of-contract exposure, and, on the other hand, administering an inadequate policy that increases exposure to discrimination and deprivation-of-due-process claims.

Quantitative vs. qualitative layoff criteria. In determining the sequence of layoffs, should the policy cite quantitative criteria, such as seniority or years in rank, or qualitative criteria, such as quality of job performance or whether the position is essential to the institution's mission? The question can be difficult. From a legal perspective, use of quantitative criteria such as seniority tends to be safest. Title VII and the Age Discrimination in Employment Act provide that an employer acts legally if it follows a "bona fide seniority system," and the courts have interpreted the law to allow layoffs in reverse order of seniority, provided that seniority is determined fairly.

Most colleges and universities, however, want to keep their best employees and prefer layoff sequences that are based on supervisors' perceptions of relative performance or job qualifications. While such sequences may be desirable operationally, reliance on qualitative criteria tends to be more hazardous legally. Application of qualitative criteria increases both the likelihood that layoff decisions will be difficult to explain persuasively and the risk that discriminatory animus will appear to infect the layoff process.[11] Complicating the legal analysis is the fact that many institutions reduce the size of their workforces not only by laying off employees but also by restructuring and reorganizing operations so that remaining employees perform new jobs. Layoff decisions based on performance deficiency should be supported by reliable and substantial evidence.

Experienced human resource professionals familiar with the institution can be valuable guides in the application of layoff criteria and clarification of various related risks. Care should be taken to ensure that, where appropriate, confidentiality of communications between such persons and the institution's legal counsel is protected by attorney-client privilege and related legal doctrines.

Pre-implementation review. One institution that recently underwent a round of staff layoffs used a policy that contained this provision:

> The layoff plan must be submitted to Human Resources and the Office of Affirmative Action Programs in sufficient time to allow those offices to review the plan prior to implementation. In the case of a layoff of 25 or more employees from a single Vice Presidential area, the layoff plan must also be submitted to the University Counsel. . . . The pertinent reviewing offices will review the layoff

plan to ensure that the plan (a) does not have an adverse impact on protected classes of employees, (b) provides an adequate and appropriately documented programmatic justification for the identification of layoff units, and (c) provides appropriately documented justification for the selection of particular employees for layoff within a classification and level. A layoff plan cannot be implemented until it has received the approval of the appropriate reviewing offices.

The provision was interpreted to require a two-stage analysis -- an initial statistical study and a follow-up case-by-case review. At the statistical stage, the operating unit in which layoffs were to be implemented provided two lists, each broken down by gender, race, and age: a list of all employees in the layoff unit, and a list of employees actually laid off. The lists were reviewed to determine whether the percentage of so-called protected employees on the latter list was larger to a statistically significant extent than on the former. If it was, the layoff plan was subject to being disapproved. (Some but by no means all such statistical variations signal legal exposure.) At the case-by-case stage, each reviewing office examined the personnel file of each person to be laid off and, where appropriate, files of similarly-situated personnel, to ensure that employees laid off were selected strictly according to layoff criteria and not based on irrelevant, undocumented, or illegal factors. The labor-intensive review process also involved supervisors, who were asked to justify their selection of employees to be laid off. Resulting layoff decisions were well insulated from successful challenge as arbitrary or discriminatory. Few EEOC charges and court challenges were brought.

The rudiments of an acceptable appeals process. To satisfy the dictates of fairness (at private institutions) and due process (at public institutions), the institution should notify personnel of the reasons for the layoff decision and give opportunity to contest it by a review within the institution. Opportunity to contest does not mean that the laid-off employee should be entitled to elaborate proceedings. Generally, it is acceptable both to limit the grounds for appeal and to apply a special appellate process distinct from and more streamlined than such existing processes as the one described in the staff grievance policy. The published grievance policy applicable to staff should specify both the procedure that applies to situations other than layoffs and the streamlined procedure for laid-off employees. Specification of the review process requires careful judgment by the institution's counsel, taking into account an array of risks and benefits in light of applicable law.

V. IMPLEMENTING LAYOFFS

Notifying Affected Employees

Sensible advice on notification of employees is contained in *Risk Management of Reductions in Force*, a 1992 publication prepared by United Educators for the National Association of College and University Business Officers:

> While experiences vary, many institutions have the line manager or department administrator communicate a layoff individually to each affected employee. Supervisors should be given extensive orientation on the notification process. They should be encouraged to be sympathetic and supportive, but to avoid giving false hopes. The human resource staff may work closely with these "notification managers" to rehearse remarks and determine if it is necessary to substitute another individual to convey the message. Central coordination of the notification schedule and the use of written materials outlining policies, procedures, and benefits [are] important.

There is no universally correct way to terminate employees. Different institutions

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have different cultures and policies and are governed by different state and local laws. Nevertheless, experience teaches that legal risks can usually be reduced by observing several commonsense rules:

First, and perhaps most important, treat employees with dignity and respect in all aspects of the matter. This is sound not only as a risk-minimization principle, but also as a matter of plain decency and compassion.

Second, carefully document in personnel files the reasons for the decision. If the layoff sequence depends on subjective evaluations of job performance and qualifications, documentation in the employee's personnel file should contain persuasive support for distinctions made.

Third, conduct terminations professionally. Diplomacy and humanity cannot make a firing easy, but at least the process can be conducted in a manner that avoids embarrassment and needless, anxiety-provoking uncertainty. Determine initially whether the layoffs will be communicated orally or in writing. Under either approach, we believe that generally it is best to provide notice individually, rather than in a group setting, and to have present at least one responsible person in addition to the staff member's supervisor. Answer the employee's questions truthfully. Usually, most questions can be anticipated. Make available information on severance benefits, outplacement assistance, and unemployment-compensation applications.

> *"Counseling is a very important part of the reductions-in-force process. We had counselors available to speak individually with employees who were terminated as well as the employees who remained. I believe the counseling services enabled the college as a whole to move forward after the staff reductions."*
>
> Maria Martinez Dillon
> Director of Human Resources
> Rollins College

Do not expect affected employees to return to work immediately; give them time to absorb the news.

Fourth, to the extent appropriate and reasonable, keep confidential, both within and outside the institution, the identities of terminated employees and the reasons for termination. Advise supervisors and others involved in the process not to make gratuitous negative statements about any person laid off. Respect employees' privacy, even while recognizing that the identity of a laid-off employee possibly will be disclosed by the employee or co-workers.

Fifth, unless the institution knows for certain that no additional layoffs will follow, its spokespersons and managers should avoid statements that may lead remaining employees to believe that their jobs are safe. At many institutions layoffs come in waves. More harm can be done by lulling staff members into a false sense of security than by truthfully communicating continuing uncertainty.

Ongoing Consideration of the Employee

Managers experienced with layoffs and other "no-fault" terminations know that supportive outreach steps to assist the employee are nearly always in the institution's interest. Investment in assisting the employee to move forward positively is usually a prudent risk management strategy, among its other virtues. Some of the outreach steps often taken by colleges and universities are identified below.

Severance Benefits

Severance packages conventionally include four elements -- a notice period before the effective date of the layoff, severance pay, continued eligibility for selected fringe benefits, and preference in applying for other internal positions. Care should be taken to comply with pertinent requirements under ERISA, including preparing any necessary formal benefits-plan documents and summary plan descriptions.

A perennial problem is whether laid-off employees should be entitled to work through

the notice period or whether the institution should substitute paid leave and require employees not to come to work. We believe that the institution's layoff policy should be flexible enough to allow the result that best serves the work units involved. In some circumstances, the functioning of essential institutional programs depends on a smooth transfer of duties from laid-off staff to those who will succeed them, and those laid off should be encouraged to remain on the job during the notice period. In other circumstances, demoralization of staff members who lose their jobs makes imperative their removal from the workplace as soon as possible.

Counseling services for laid-off personnel are often cost-efficient to the institution, valuable to the employee, and likely to reduce claims.

Similarly, outplacement services, including possible retention of an outside firm, can be helpful and valued benefits, as can pre-retirement counseling for personnel who take early retirement. Experience shows that when laid-off employees feel that they have a meaningful prospect of future employment or a secure retirement they are less likely to assert unwarranted claims against the institution.

Some institutions conventionally require employees to execute a release in return for severance pay. Other institutions do not. Counsel should be consulted on the issue.

Severance pay is usually keyed to length of service, and a formula used to determine how much severance each laid-off staff member is entitled to receive -- for example, two weeks plus one additional week for every five years of completed service, up to a maximum of six weeks' pay. The subject of severance-pay policy is complex and warrants careful consideration.

The federal COBRA law requires that employer-provided health benefits be made available for up to 18 months following termination. At some institutions, laid-off employees also qualify for further post-separation benefits, such as tuition benefits for dependents who currently receive them. Benefits specialists should be consulted.

Laid-off employees ordinarily receive various re-employment preferences, such as recall rights for a certain period, notice of job vacancies, preferences over external candidates, restoration of seniority benefits upon rehire, and the presumption of no break in service if the employee is recalled within a specified period.

Thorny issues can be posed when laid-off employees request positive letters of reference. Ordinarily, an employer may not attempt to prevent a discharged employee from obtaining other employment, but may truthfully state the reason for the discharge. There can be a fine line, however, between the truth and slander or libel, even in the case of an employment reference. To reduce exposure to such defamation claims, some institutions adopt the general policy of providing in response to reference requests only basic factual information, such as dates of employment and last position held. Administering and monitoring compliance with institutional policy on references is a challenge at colleges and universities, where many individuals may be contacted by prospective employers.

Attention to Problems of Remaining Employees

The residual effects on employees not laid off should be considered. Layoffs are often preceded by weeks or even months of intra-office tension, with resulting loss of efficiency

> ***"It is important to understand that the downsizing plan should not end the day the affected employees leave. Even a modest reduction in staff can send shock waves through an institution that can be felt for several years."***
>
> Ruth Constantine
> Chief Financial Officer
> Smith College

and harmony. Layoffs can leave surviving employees overburdened. Their loyalty to the institution may be shaken by feelings of resentment and guilt. They may be called upon to perform added duties without added compensation. A well-conceived layoff plan recognizes the need to restore employee morale, alleviate anxiety, and restructure the working environment to lessen burdens on employees who remain.

If the institution plans to restructure job duties and reporting relationships substantially, waiting until the work environment has stabilized may be best. In her book, *You Can Get There From Here: The Road to Downsizing in Higher Education*, Barbara Butterfield, Vice President for Faculty and Staff Services at Stanford University, notes:

A newly streamlined, right-sized work force is probably skeptical of management direction in the immediate aftermath of downsizing. Employees may have lost friends and colleagues to layoffs, may be shouldering an additional workload, and may be emotionally wounded and unsure of their own future in the organization.

To safeguard against employee cynicism, it is best not to implement any work modification plan in a period of extreme change. Jumping immediately into work redesign runs the risk of employees writing it off as yet another trendy new approach that will dissolve when the latest leader leaves.

VI. IN SUMMARY: A PRE-TERMINATION CHECKLIST

1. **Develop an overall management plan for the layoffs.** The plan should analyze such questions as these:

- Are the layoffs necessary?
- Who are the members of the planning group?
- Who will be the institutional spokesperson?
- Who has been involved in the decision and who has been consulted?
- Have alternatives been considered?
- Is the institution comfortable that its layoff planning and implementation will pass the "front-page test"?

2. **Plan carefully for identifying persons to be laid-off.**

- Does the institution have a workable layoff policy?
- Do managers fully understand the criteria that will be used for identifying positions to be eliminated?
- Are the layoff criteria quantitative or qualitative? If qualitative, how are the criteria to be applied? Is the assessment in each case adequately documented?
- Are the reasons why employees are selected for layoff internally consistent? If work performance is a criterion, does the personnel file of the laid-off employee support the determination that the employee should be laid off while others are not?
- Will there be disproportionate impact on "protected classes" of employees? If so, can there be assurance that the institution can prove that no invidious discrimination figured in termination decisions?

3. **Prepare carefully to notify affected employees.**

- Tell employees the truth and treat them throughout with dignity and respect.
- Make sure that employees understand the criteria used to determine layoff sequence.
- How much notice will be given?
- Who will be responsible for notifying each individual?
- Insist that managers confer with trained human resource professionals to identify and address questions likely to arise.
- Respect employees' privacy.
- Prepare written materials on severance arrangements, outplacement assistance, re-employment rights, and appeal rights, and have the materials available at individual employee meetings.

4. **Anticipate the reactions and needs of remaining employees.**

- Explain any reorganization or job restructuring necessitated by layoffs.
- Use briefing sessions and group counseling to alleviate anxieties.

5. **Debrief afterward.**

- Identify a small group of key administrators who will be responsible for monitoring and evaluating the process.
- Consider whether institutional policies and practices should be modified based on the experience gleaned during the initial round of layoffs.

FURTHER READING

1. National Association of College and University Business Officers, *NACUBO Advisory Report 92-1: Risk Management of Reductions in Force* (available from NACUBO, One Dupont Circle, N.W., Suite 500, Washington, D.C. 20036-1178 -- (202) 861-2500).

   Prepared for NACUBO by United Educators Risk Retention Group, Inc., this 14-page monograph outlines a well-organized six-point strategy for designing and implementing a college or university retrenchment plan. The monograph includes a useful "Check-List for Internal Planning," and describes the experience of two institutions, one public and one private, in implementing large-scale layoffs in the early 1990's.

2. American Association of University Professors, "AAUP College and University Fiscal Crisis Update" (available from the AAUP, 1012 Fourteenth Street, N.W., Suite 500, Washington, D.C. 20005 -- (202) 737-5900).

   An occasionally published compendium of short reports on the responses of campuses across the nation to budget reductions.

3. B. Butterfield and S. Wolfe, *You Can Get There from Here: The Road to Downsizing in Higher Education* (College and University Personnel Association 1994) (available from CUPA, 1233 20th Street, N.W., Suite 301, Washington, DC 20036 -- (202) 429-0311).

4. Outlines from Continuing Legal Education Conferences of the National Association of College and University Attorneys:

   - L. White, *Restructuring: Planning and Implementing Staff Layoffs, Focusing on the Role of the University Counsel*, NACUA Annual Conference, June 26, 1993.

   - T.P. Hustoles, *Practical Considerations for Effecting Legally Defensible Reductions in Force*, NACUA Annual Conference, June 30, 1992.

   - C.L. Harris, Jr., *Handling Employees in Downsizing*, NACUA Midwinter Continuing Legal Education Conference, March 1992.

   - C.A. Houpt, *The Age of Austerity: Downsizing for the 90's*, NACUA Annual Conference, June 19, 1991.

   - S.G. Kramer, *Downsizing: Anticipating and Avoiding Litigation*, NACUA Annual Conference, June 19, 1991.

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ENDNOTES

[i] The collective bargaining agreement between one Michigan public university and its unionized staff employees contains this provision: "[T]emporary adjustments in the workforce can be made without application of the Layoff . . . Procedures. Such temporary layoffs will not exceed a total of seven (7) days per contract year or two (2) days per pay period, and the Union will be notified before such layoffs are implemented." *Quoted in* T.P. Hustoles, *Practical Considerations for Effecting Legally Defensible Reductions in Force*, a paper presented at the 32nd Annual Conference of the National Ass'n of College and University Attorneys, Chicago, Illinois, June 30, 1992, p.7.

[ii] For examples of some of the kinds of legal issues that arise when early retirement incentive plans provided differentiated benefits depending on the age of recipients, see, *e.g., Karlen v. City Colleges of Chicago*, 837 F.2d 314 (7th Cir. 1988) (holding ADEA violated by early retirement plan that provided continued life insurance coverage to faculty retirees aged 55 to 64, but not those aged 65 and older), and *Cipriano v. Board of Education of City School District of North Tonawanda, New York*, 785 F.2d 51 (2d Cir. 1986) (sustaining, prior to enactment of OWBPA, plan that offered $10,000 lump-sum benefit to faculty retirees aged 55 to 60, but not those over 60).

[iii] *E.g., Sega v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985); *Burruss v. United Telephone Co. of Kansas*, 683 F.2d 339 (10th Cir.), *cert. denied*, 459 U.S. 1071 (1982). *See generally* Schlei & Grossman, EMPLOYMENT DISCRIMINATION LAW 202 (2d ed. 1983).